Supreme Court of United States

October Term, 1921.

No. [redacted]84

THOMAS F. E. RYAN,

Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

APPELLANT'S BRIEF.

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IN THE

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THOMAS F. E. RYAN,
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No. 292

APPEAL FROM THE COURT OF CLAIMS.

Statement of the Case.

I.

This is one of some 320 "class" cases that were held in the Court of Claims pending the decision of this Court in the test case of *Cochnower vs. United States*, 248 U. S. 405, and 249 U. S., 588. It was thought by counsel in the case at bar, who also appeared as counsel for Cochnower, that the decision of this Court in the latter case would render unnecessary the trial of any other of the pending cases. In this view and hope the attorneys for the Government concurred. The claimants in all of these 320 cases were customs inspectors in the port of New York. The claims were in part founded upon the contention that the New York inspectors were entitled to a compensation of $6 *per diem* on and after the passage of the Act of

March 4, 1909 (C. 314, 35 Stat., 1065). There were some 375 such inspectors at New York at the time of the passage of this act and all of them were receiving $5 *per diem* (R. 9), pursuant to the Act of December 16, 1902 (C. 2, 32 Stat., 753). Claiming to act under the authority of the Act of 1909, the secretary of the treasury appointed a committee in 1910 to classify and grade the New York inspectors. Under the committee plan, which went into effect July 1, 1910, 52 of the inspectors were *increased* to $6 *per diem*, while 52 others were *demoted* to $4 *per diem*, leaving the balance, about 270 in number, at their former salary of $5 *per diem*, thus causing no increase in salary expense (R. 10). The appellant Ryan was appointed at $4 *per diem* on April 16, 1910, some two and a half months before the "classification" and "grading," became effective. Following Ryan's appointment, there were some 20 or 25 others appointed at $4 *per diem* in advance of and in anticipation of the committee's plan (R. 9, finding VI). There were several inspectors removed on July 1, 1910, when the "classification" went into effect, others resigned and transferred, and each vacancy thus created was filled by the appointment of a new man at $4 *per diem*. Owing to the committee's recommendations, it was found necessary to increase the force at New York by appointing some 50 additional inspectors. These appointments were all made at $4 *per diem*.

II.

In July, 1914, the Cochnower suit was filed in the Court of Claims. Prior to that time, however, the

inspectors had endeavored to get a favorable ruling from the department on their claim of $6 for all. Their efforts were unsuccessful, for in May, 1914, the Comptroller of the Treasury, George E. Downey, denied their claim (see Comp. Opinion May 7, 1914, appeal No. 23590). Two months later the test suit was filed in the Court of Claims. It was decided by counsel to take the case of a $4 inspector for the test suit as it was thought that the rights of both the $4 and $5 inspectors could and would be settled in one litigation. Cochnower was selected as he was a $4 man and was anxious to have his claim put forward as the test case. Cochnower sued for $6 *per diem* from July 1, 1910 (the date of his demotion to $4), to the date of the filing of his petition. He claimed two things: (1st) That there was no power to reduce the salary of his office below $5 *per diem* and by reason thereof he was entitled to recover $1 *per diem*, and (2nd) that he should have been promoted to $6 *per diem* under the Act of March 4, 1909 (C. 314, 35 Stat. 1065, Sec. 2), along with other inspectors on July 1, 1910, and by reason thereof he was entitled to an additional $1 *per diem*. This Court sustained his first claim but denied his second (249 U. S., 588).

III.

After the filing of Cochnower's petition on July 6, 1914, the other 320 claims were duly filed in the court below from time to time. The Ryan claim (the case at bar) was filed April 13, 1916. The Cochnower case was argued in the court below on the same day. All of the 320 claims were filed within the 6

years' statute of limitations. By consent of counsel on both sides, no action was taken in any of the other 320 cases, but they were allowed to remain on the general docket in the court below to await the outcome of the Cochnower case.

IV.

The cases were divided into two groups: Group 1, known as the "$5 cases," consisted of some 200 claims of $5 *per diem* inspectors where a recovery of $1 *per diem* was sought; Group 2, known as the "$4 cases," was composed of 120 claims of $4 inspectors where a recovery of $2 *per diem* was sought.

V.

When the mandate of this Court in the Cochnower case was presented in the court below in April, 1919, it was agreed between counsel and the Court that the "$5 cases" should be dismissed and judgment entered in the "$4 cases," but only for $1 *per diem* as that was the recovery allowed to Cochnower. All of the 320 cases were put on the calendar of the court below for a subsequent date, sufficient time being allowed to obtain the necessary information from the Treasury Department to permit the entry of correct judgments in the "$4 cases." On the date set the "$5 cases" were called (some 200 in number), and all were dismissed on consent of counsel. The "$4 cases" were then called and a motion for judgment in each case was duly made. These motions were denied except in about 35 cases, the Court contending that there was a

distinction in law in the "$4 cases"—that all of them did not stand on the same basis. Of the "$4 cases," 35 claims were filed by inspectors who, like Cochnower, had been demoted from $5 to $4 *per diem* on July 1, 1910. The other 85 claims were those of inspectors who had been appointed at $4 *per diem* after the passage of the Act of March 4, 1909.

VI.

Judgments were duly entered in the 35 cases for about $1,000 each. It became necessary under the ruling of the Court below to start *de novo* with one of the 85 cases remaining on the calendar. The Ryan case was selected as he was the first appointee to the $4.00 grade. Counsel on both sides entered into a written stipulation and filed same in the Court below, that the decision in the Ryan case should govern and control the 84 other pending cases. The Ryan case was argued in the Court below on November 11, 1920, and again on January 11, 1921. On February 21, 1921, the petition was dismissed and this appeal was thereupon taken. The other 84 cases are in the Court below awaiting the decision of this Court in the instant case.

All of the foregoing facts are of public record.

VII.

Ryan's original petition (See R. 12) asked for judgment at the rate of $2.00 *per diem* (as did the Cochnower and all the other similar cases), but after this Court decided that Cochnower was entitled to recover only $1.00 *per diem*, an amended and supple-

mental petition was filed by Ryan, reducing his claim to $1.00 *per diem* (R. 1-5).

Ryan was appointed at $4.00 *per diem* on April 16, 1910 (R. 7).

Promoted to $5.00 *per diem* October 10, 1919 (R. 7)

Promoted to $5.50 *per diem* July 1, 1920 (R. 7).

This suit is to recover $1.00 *per diem* from April 16, 1910 to October 10, 1919 (R. 1-5).

Ryan, like most of his associates, had been promoted from a clerkship to his office as an inspector after passing the necessary examination. Many of his associate inspectors were promoted from similar clerkships but were paid $5.00 *per diem* as inspectors, while Ryan received only $4.00 *per diem*. Under the "Committee" plan of 1910, there was no definite fixed salary basis provided except as above stated; each inspector received such salary as the Collector saw fit to pay; the Acts of Congress did not seem to have much weight there.

VIII.

Ryan is still an inspector at the port of New York (R. 11). He was promoted to the *proper* salary of his office, $5.00 *per diem*, on October 10, 1919, and has since that time been given a further promotion for merit under the Act of March 4, 1909.

He comes to this Court asking that his back pay at the rate of $1.00 *per diem* be awarded him from the date of his appointment in 1910 to the date when he received his lawful salary in 1919.

IX.

The record below.

Petition was filed in the Court below April 13, 1916 (R. 1). By leave of Court, an amended petition was filed July 2, 1919 (R. 1). Motion for leave to file amended paragraphs to amended petition was filed in open court April 13, 1920 (R. 1). Motion overruled April 19, 1920 (R. 1). Motion for leave to file supplemental petition filed April 24, 1920 (R. 1). Motion ordered to files to await trial May 3, 1920 (R. 1). Motion for leave to file amended and supplemental petition made in open Court November 11, 1920. Motion allowed and claimant given five days to file said petition (R. 1). Amended and supplemental petition filed November 12, 1920 (R. 1-5). General traverse was entered before argument and submission of case November 11, 1920 (R. 6). On December 13, 1920, order was entered remanding case to the calendar for reargument, the Court having made a call on the Treasury Department on its own motion (R. 6). Case was reargued and submitted on January 11, 1921 (R. 6). Findings of Fact, Conclusions of Law, and Opinion of the Court were filed February 21, 1921. Petition was dismissed on the same day (R. 12). Application for appeal was made and allowed March 21, 1920 (R. 22).

Assignment of Errors.

The Court below erred:

First: In dismissing the petition;

Second: In not rendering judgment for the claimant in the sum of Thirty-four hundred sixty-five ($3465) dollars.

Brief of Argument.

I.

The salary of the office of inspector of customs at the Port of New York, at the time of appellant's appointment, was fixed by law at $5 per diem.

Prior to 1864, the compensation of the office of inspector of customs at the Port of New York was $3.00 *per diem* (R. S. 2733). This salary was increased to $4.00 *per diem* by the Act of April 29, 1864 (C. 71, 13 Stat., 61). The salary of $4.00 *per diem* was continued until January 1, 1903, when the same was increased to $5.00 *per diem* pursuant to the Act of December 16, 1902, as follows:

> Act of December 16, 1902, c. 2, 32 Stats., 753, entitled
>
> "An Act regulating the duties and *fixing the compensation* of the customs inspectors at the *Port of New York*." (Italics ours.)
>
> "That the Secretary of the Treasury is hereby authorized to increase the compensation of inspectors of customs at the Port of New York,

> as he may think advisable and proper, by adding to their *present* compensation a sum not exceeding one dollar per day, which additional compensation shall be for work now performed by them at unusual hours, for which no compensation is now allowed, and shall include work performed by said inspectors at night in examining passengers' baggage, and also as reimbursement for expenses incurred by them for meals and transportation while in the discharge or performance of their official duties." (Italics ours.)

All of the New York inspectors received the increase to $5.00 *per diem* (R. 9, Finding VI).

The Secretary of the Treasury attempted to reduce this compensation at the Port of New York on October 1, 1905, by reducing the salaries of all the inspectors at said port to $4.00 *per diem*. Thereafter, *being advised that he could not make the reduction, he* restored said compensation on or about the 8th day of January, 1906 (*Cochnower vs. U. S.*, 51 Ct. Cls., 461; Finding V).

It is contended by the Court below that the Secretary of the Treasury was not compelled to exercise the power conferred in the Act of December 16, 1902 (c. 2, 32 Stats. 753), to increase the salaries of the New York inspectors by $1.00 *per diem*, but the fact remains that he did exercise the power immediately and raised the salary of the office to $5.00. The act gave him no power to reduce the salary, he having once raised it. He was given the discretionary right to say whether or not the salary should be fixed at $5.00 and he so fixed it. His delegated power then ceased, as he discovered when he subsequently endeavored to reduce the salary to the old scale; viz. $4.00 *per diem*.

The title to the act also indicates that Congress intended that the Secretary should fix the salary.

The matter of the attempted reduction of the New York inspectors was brought to the attention of Congress, and that body appropriated in two different acts sufficient moneys to pay them the difference between the salary paid them of $4.00 during the three months' period of the reduction and their proper salary of $5.00 *per diem*. We quote both of these acts:

> Act of June 30, 1906, c. 3912, 34 Stats., 636. Deficiencies Appropriation Act, in part as follows:
>
> "To pay the inspectors of customs of the *Port of New York* the *difference* between the *per diem* salary of four dollars paid them during the months of October, November and December, 1905, and their *proper per diem salary for the same period (five dollars per diem) in accordance with the Act of Congress approved December 16, 1902*, thirty-one thousand dollars, or so much thereof as may be necessary." (Italics ours.)

> Act of March 4, 1907, c. 2919, 34 Stats., 1373. Deficiencies Appropriation Act, in part as follows:
>
> "To enable the Secretary of the Treasury to pay to certain inspectors of customs of the *Port of New York* the *difference* between the *per diem* salary of four dollars paid them during the months of October, November and December, 1905, and their *proper per diem salary of five dollars* for the same period, nine hundred forty dollars." (Italics ours.)

The reasons for the foregoing acts are set forth in a letter from the Acting Secretary of the Treasury to the

Chairman of the House Committee on Claims, as follows:

"April 14, 1906.

"Hon. James M. Miller,
Chairman Committee on Claims,
House of Representatives

"Sir:

"Replying to your letter of this date, enclosing copy of H. R. 17,957, for the relief of the day inspectors of customs at the port of New York, and requesting that your committee be furnished with facts and information concerning this claim and an opinion touching the merits of the case, I have the honor to state that under the act of Congress approved December 16, 1902, the compensation of all the inspectors of customs at the port of New York was increased from four dollars *per diem* to the rate of five dollars *per diem* and continued at that rate until September 30, 1905, following which date the department directed a reduction in their compensation to the rate of four dollars *per diem*. Under a decision of the Comptroller of the Treasury, dated, December 29, 1905, the compensation of these inspectors was again increased to the rate of five dollars *per diem* beginning January 1, 1906, and for the purpose of allowing such inspectors the additional compensation of one dollar *per diem each* from October 1, 1905, to December 31, 1905, inclusive the bill enclosed in your letter was introduced.

The department favors the passage of the bill, but recommends that the money required for the purpose shall be made payable out of any money in the Treasury not otherwise appropriated, rather than out of the current appropriation for expenses of collecting the revenue from customs, for the reason that it would probably

> result in a deficiency in that appropriation, which the department desires to avoid, and by close economy will avoid, unless this additional expense is put upon it.
>
> Respectfully,
>
> (Signed) J. B. REYNOLDS,
> Acting Secretary."
>
> (Italics ours.)

The foregoing letter is not a part of the record in this case but it is in the files of the Treasury Department and the House Committee on Claims and is a public document and as such, this Court will take judicial notice thereof.

> *New York Indians vs. United States*, 170 U. S. 1, 32.
> *The Paquette Habana*, 175 U. S. 677, 696.

Furthermore, this letter was a part of the record of the Cochnower case in the Court of Claims (51 Court of Claims 461). It was produced by the Treasury Department in response to a motion by the claimant for a call on the department, and was printed in the Cochnower record in the Court of Claims at page 143 thereof.

Taking up for consideration the Act of 1902, and the interpretation thereof by Congress in the Acts of 1906 and 1907, above quoted, we find a positive legislative declaration that the Act of 1902 was intended to fix the pay of inspectors at the Port of New York at five ($5) dollars *per diem*. If such is not the conclusion to be deduced from these acts, what could have been in the legislative mind when it said "to pay the inspectors of customs of the Port of New York the *difference* between the *per diem* salary of $4 paid them during the months of October, November and Decem-

ber, 1905, and their *proper per diem salary for the same period ($5) per diem, in accordance with the Act of Congress approved December 16, 1902"?* (Italics ours.) The word "accordance" is most significant. It means "agreement; harmony; conformity." *Webster.* Thus we have a direct legislative declaration of the meaning of the Act of 1902. It must be given force as a Congressional interpretation of prior legislation or as a retroactive statute fixing the salary at $5 *per diem.* The result is the same in either case. The word "proper" means "correct," "rightful," "lawful," while the word "accordance" adds its positive assertion, and we cannot ignore the meaning of these plain declarations. Congress not only said that $5 *per diem* was the *proper* salary but that it was the proper salary in *accordance with the Act of December 16, 1902.* The salaries of the New York inspectors, we contend, were legislatively fixed thereby, and must stand at such rate until Congress enacts to the contrary. In 1909 the maximum salary was raised to $6 *per diem,* as we shall show hereafter, but the legislative minimum of $5 fixed as above stated, has never been disturbed by Congress.

The case of *James vs. The United States,* 202 U. S. 401, is on all fours with the case at bar in this respect. In the *James* case the salary of the Judges of the Supreme Court of the District of Columbia was fixed at $4,000 by the Act of 1866. By an act passed June 30, 1891, Congress appropriated $5,000 for the salary of each of said judges. The appropriation act of the following year only appropriated $4,000 for each of them. Justice James retired from that court in December, 1892, and was paid the said sum of $4,000 during

his retirement. After his death his administratrix brought suit for the additional $1,000 *per annum*. The case turned upon the proper construction of the Deficiencies Appropriation Act of March 2, 1895, as follows:

> "To pay the Chief Justice and five Associate Judges of the Supreme Court of the District of Columbia the difference between the rate of compensation received by them and five thousand dollars per annum for the fiscal year 1893."

It is to be noted how nearly alike the above language is to the Act of June 30, 1906, relied on by this appellant. In fact, the Act of 1906 is stronger than the act just above quoted, as indicative of the legislative declaration of the meaning of a former statute, for the Act of 1906 said that the *proper* salary of inspectors of customs was $5 per diem, *in accordance with the Act of 1902*, whereas in the *James* case the subsequent statute omits to say that $5,000 was the proper salary of the district judges.

In the *James* case both the Acts of 1891, appropriating $5,000 for the salary of the justices, and of 1892, appropriating only $4,000, contained the usual clause repealing all acts and parts of acts inconsistent therewith.

This Court, in giving judgment to the administratrix of Justice James, decided that Congress had the power to declare the meaning of a previous statute so as to bind the courts thereafter.

The language of the Court, speaking through Mr. Justice White, at page 407, clearly held that the Act of 1895, was to be given efficacy either as a Congressional interpretation of the prior legislation or

as a retroactive statute fixing the salary for the year 1893.

In the light of the above authority, how then can it be said that the Act of 1906, in the case at bar, had no binding effect upon the Secretary of the Treasury? Clearly, Congress fixed the pay of the office of inspector at New York at $5 *per diem.*

It is a well settled rule of law that a legislative body may declare the meaning of a previous statute so as to bind the courts with reference to all transactions occurring thereafter, for such declaration is equivalent to new legislation.

> *United States vs. Freeman,* 3 How. 556.
> *Stockdale vs. Insurance Co.,* 20 Wall. 323.
> *Cope vs. Cope,* 137 U. S. 682.
> *Swigart vs. Baker,* 229 U. S. 187.

We submit that the words that we have italicized in the Acts of June 30, 1906 and March 4, 1907, must be construed according to the doctrine announced in the foregoing cases or else be wholly deprived of any significance or force whatever, for to deny such meaning renders them merely idle and useless words. Those acts appropriated money to pay the *difference* between the *per diem* salary of $4.00 paid the inspectors at New York in the months named therein and their *"proper per diem salary of $5, in accordance with the Act of 1902.* To disregard the declaratory words in these acts would be to hold that Congress twice did the idle and useless thing of including them.

And, having fixed the salary at $5 *per diem,* it becomes pertinent to inquire as to whether or not Congress has authorized a reduction thereof. The only

salary legislation affecting the New York inspectors since the Act of December 16, 1902, is the Act of March 4, 1909 (c. 314, Sect. 2; 35 Stat. 1065) as follows:

> "That the Secretary of the Treasury be, and he is hereby authorized *to increase and fix* the compensation of inspectors of customs, *as he may think advisable, not to exceed* in any case the rate of six dollars *per diem*, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours." (Italics ours.)

It is clear that the foregoing statute authorizes *only* an increase, the amount thereof to be in the discretion of the Secretary of the Treasury, but not to exceed $6 *per diem*. Where, then, is the authority of the Secretary of the Treasury to be found to reduce the salary of this office below $5 *per diem?* It is idle, however, to discuss these propositions further for this Court considered them all in the *Cochnower* case, 248 U. S. 405, and 249 U. S. 588, and decided them contrary to the rulings of the Court below in the instant case. In that case, the claimant, an inspector of customs at the Port of New York, was receiving the fixed salary for that office of $5 *per diem* on July 1, 1910, when he was reduced by the Secretary of the Treasury to $4 *per diem*. He brought suit for the difference between his lawful salary of $5 and the sum actually paid him after his reduction, viz, $4. He also claimed an additional one dollar *per diem*, contending that he should have been increased to $6 *per diem* on July 1, 1910.

Cochnower's claim for the one dollar *per diem* that was taken away from him was based solely upon the ground that he was holding an office, the salary of which had been fixed by law at $5 *per diem,* and that, therefore, the Treasury Department had no right to reduce same without authority of Congress. Counsel for Cochnower maintained this contention consistently through the entire litigation in the Court of Claims and in the Supreme Court. At no time during that litigation was there any contention made that the department had no right to demote the claimant. The contention was made that while Cochnower might have been lawfully reduced to a clerkship or other position by the Secretary of the Treasury, the *salary of his office could not be reduced.* In the first brief filed by Cochnower's attorneys in the Court of Claims, on page 23, there appears the following statement of this contention:

> "There was no authority vested in the Secretary of the Treasury by virtue of the Act of March 4, 1909, nor any other act, to reduce the salary of the office held by claimant to $4 *per diem* (1), because there is no power vested in an executive officer to change (either decrease or increase) the salary of a public office fixed by law; (2), because such reduction clearly contravened and evaded the intent of the Act of March 4th, 1909, *supra;* (3), because Congress had definitely fixed by special statutes the salary of the office of inspector of customs at the Port of New York, at $5 *per diem.*"

In Cochnower's reply brief in the Court of Claims, at page 109 thereof, this same contention was again clearly stated as follows:

> "Claimant was unlawfully reduced to a four dollar *per diem* salary because the salary of his office at the Port of New York had been fixed by law at $5 *per diem.*"

When the *Cochnower* case reached this court, counsel again stated clearly this contention in the brief, page 21 thereof:

> "An executive officer may not change a salary fixed by statute. It is well settled that when Congress has fixed the salary of a public officer by statute that an executive officer may not increase or decrease same. The ruling above announced has been conclusively settled by this Court (*Glavey vs. United States*, 182 U. S. 595; *United States vs. Andrews*, 240 U. S. 90). Appellant insists that the statutory salary was fixed in the Port of New York by the Acts of 1902 and 1906 at $5 *per diem* for inspectors of customs."

Again, in this court, this contention was restated by counsel in the brief responding to the Government's petition for a rehearing. On page 2 of said brief appears the following:

> "8. The salary of the *office of inspector* at New York had been *fixed by law at* $5 *per diem* prior to the Act of March 4, 1909."

On page 8 of said brief the proposition was again set forth in the following language by counsel:

> "We do not for one moment dispute the power of the secretary to remove or to reduce this appellant, or any other officer in the customs service, from one position to another. What we have found fault with in the instant case, is that the secretary attempted to reduce the *salary of an office* when same had been

> *fixed by law.* * * * In order to hold that there was no right of reduction, as this Court has held, the Court had to determine first whether appellant held a position to which there was a salary *fixed by law.* We are not dealing at all with a case involving the discretion of the Secretary of the Treasury. We concede that the Court will not interfere with an administrative officer in the exercise of his discretionary power. However, when a salary has been fixed by law, the administrative branch of the government may not increase it or decrease it (*Glavey vs. United States,* 182 U. S. 595; *United States vs. Andrews,* 240 U. S. 90).
>
> "Therefore it follows that this Court did consider the acts prior to the Act of 1909, and did hold that the salary of the office of inspector in the Port of New York had become fixed at $5 *per diem* and could not be reduced by administrative action."

This Court squarely held in the *Cochnower* case that there was no authority vested in the Secretary of the Treasury to decrease the salary of inspectors at the Port of New York, and we submit that this decision is conclusive in the instant case. There is no possible theory upon which Cochnower could have been awarded a judgment by this Court except the one theory advanced by his counsel and sustained by the Court, that his right to recover depended upon whether or not he held an office, the salary of which had been fixed by law.

It is true that the appellant in the case at bar was not reduced from $5 to $4 *per diem* but was originally appointed at the lower rate. The principle, however, is precisely the same. Ryan was appointed

to an office to which the law affixed the salary of $5 *per diem*. His acceptance of a lower salary could not have the effect of changing the law. The Secretary of the Treasury had no power to change this salary and manifestly no act on the part of his subordinate, the appellant Ryan, could invest the secretary with a power that the latter did not possess. This principle was clearly enunciated in the case of *Miller vs. United States*, 103 Fed. 413; *Glavey vs. United States*, 182 U. S. 595. In the *Glavey* case, at page 609, the Court quoted with approval the following language of Judge Lacombe in the *Miller* case:

> "Any bargain whereby in advance of his appointment to an office *with a salary fixed by legislative authority*, the appointee attempts to agree with the individual making the appointment that he will waive all salary or *accept something less than the statutory sum*, is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed but will not come for less. And if public policy prohibits such a bargain in advance, it would seem that a Court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel." (Italics ours.)

An exactly parallel case on the facts is that of

Adams vs. United States, 20 Ct. Cls. 115.

Adams was appointed inspector of customs for Lake Champlain District, May 8, 1874, at $2.50 *per diem*.

Adam's office carried a salary of $3.00 *per diem* under R. S. 2733.

Adams waited almost 6 years before filing suit.

Adams was *allowed* judgment for the difference in pay by the Court of Claims.

Ryan was appointed inspector of customs for Port of New York, April 16, 1910, at $4.00 *per diem*.

Ryan's office carried a salary of $5.00 *per diem* under Act Dec. 16, 1902; Act June 30, 1906.

So did Ryan wait.

Ryan was *denied* judgment for the difference in pay by the Court of Claims.

The Court of Claims had this same proposition of law before it on at least two other occasions and allowed judgment for the claimants.

See:

Rush et al. vs. United States, 35 Ct. Cls. 223.
Jacobs vs. United States, 41 Ct. Cls. 452.

This Court considered and approved the ruling in the *Adams* case in the *Glavey* case, *supra*. Mr. Justice Harlan, speaking for the Court, said at page 607, referring to and quoting from the *Adams* case:

> "We do not think he thereby relinquished his right to claim the further compensation allowed by law. If the appointing officer had no power to change the compensation of the inspector, certainly the paying officer has not. He had no right to exact such a receipt and the claimant loses nothing by signing it." (Cases cited.)

Mr. Justice Harlan stated further, at page 609, in the *Glavey* case:

> "It was not competent for the Secretary of the Treasury, having the power of appointment, to defeat that purpose by what was, in effect, a bargain or agreement between him and the appointee that the latter should not demand the compensation fixed by statute."

From the foregoing it is clear that claimant should have been appointed at $5 *per diem* on April 16, 1910, and that his acceptance of a lower salary has not barred him from recovering the difference between the salary received, namely, $4 *per diem,* and the lawful salary of $5. The $5 salary attached to the office when the appointment was made.

In the *Glavey* case, the claimant waited six years, short of three days, before filing his suit, so it would seem that the argument of the Court below in the instant case (R., bottom p. 21 and top p. 22), that Ryan waived his rights by delaying the filing of his suit for about six years, ignores its own ruling in the *Adams* case and the ruling of this Court in the *Glavey* case. However, this raises the question of laches and estoppel which we shall discuss more fully in the next point.

II.

Estoppel.

There is in this case no form or kind of estoppel.

In the concluding portion of the opinion (R. 21, 22), it is contended that the appellant lost his right to make claim to increased compensation because he did not assert his rights until near the expiration of the statutory period of six years.

1. We will first deal with that proposition on the theory that it means that the appellant lost his right through laches of one kind or another, either abandonment, acquiescence or undue delay, and we submit that the doctrine of laches does not apply.

The United States has consented that it may be sued in the Court of Claims on "all claims founded upon the Constitution of the United States or any law of Congress" * * * (*Judicial Code*, Sec. 145, c. 231, 36 Stat. pp. 1087, 1136); and Section 156, page 1139, enacts that the petition must be filed "within six years after the claim first accrues" or it "shall be forever barred." These are re-enactments of statutes long in force, and it will be observed that they confer the legal right to sue within six years on a claim founded on a law of Congress, as in the instant case.

We submit that these statutes do not stand in need of interpretation, but we will call attention to a few of the many cases that are in point here, each of which originated in the Court of Claims.

(a) In the case of the *United States vs. Northern American Transportation and Trading Company*, 253 U. S. 330, the corporation sued for the value of land, a mining claim which was first occupied by the government for military purposes, July 1, 1900 (pp. 331, 332). The action was filed in the Court of Claims December 7, 1906 (p. 331), or just one day less than six years after the President issued an order reserving the land from sale and setting it aside for military purposes, the order being dated December 8, 1900, and the land was continuously afterwards held and occupied by the United States (p. 332).

The government contended that the taking and occupation began more than six years before the commencement of the suit, and hence the action was barred. The Court below found (53 Ct. Cls., 424, 428) that the property was taken within six years; that is, on December 8, 1900, the date of the President's order, and that its value was $23,800.

This Court said (p. 334):

> "Since the cause of action arose after December 7, 1900, this suit was not barred by Section 156 of the Judicial Code."

The judgment of the Court below was affirmed.

In that case the claimant "stood by" for six years, less one day, and yet it did not lose its right of action. The Courts saw no kind of laches there and we submit there is none here. It will be noted that the case at bar is even stronger in favor of appellant, for here the whole right of action did not accrue on one day or in one year, but accrued and increased from day to day. We submit that the instant case is within the rule laid down in the case above cited.

(b) But there is abundant authority to be found in the reports of the Court of Claims deciding compensation, fee or salary cases, in which it is held that the six-year statute does not begin to run until the compensation or salary is due and payable and that the official, within the six years, may sue the United States and recover.

Among the many cases of the kind are these:

Bachelor vs. United States, 8 Ct. Cls. 235, 239, 240;
Lawson vs. United States, 14 Ct. Cls. 332, 339 (Affirmed in 101 U. S. 164, 169);
Ellsworth vs. United States, 14 Ct. Cls. 382, 395 (Affirmed in 101 U. S. 170);
Mosby vs. United States, 24 Ct. Cls. 1;
Book vs. United States, 31 Ct. Cls. 272;
Adams vs. United States, supra;
Glavey vs. United States, supra.

In those cases recoveries were had for items or amounts falling due at various periods within the six years prior to filing the petitions and, though the items or amounts so falling due were of the same nature, the Courts did not consider or hold that the claimant had been guilty of laches in not suing when any of the items or demands fell due, though each claimant waited long thereafter before suing. In each case the officer went right on with the discharge of his official duties in the years while his right of action was accumulating in amount, just as this appellant did, but neither Court thought or held him guilty of laches.

(c) But laches is no defense to an *action at law.* If the plaintiff in such an action files his petition with-

in the statutory period, the Court cannot deprive him of his right to proceed.

Werhman vs. Conklin, 155 U. S. 314, 326.

The same situation existed in the *Cochnower* case (51 Ct. Cls. 461).

The record in this court (pp. 1-3) and the opinion of the Court below (p. 464) show that Cochnower sued for additional salary covering a period of five years, he occupying the office all the time and receiving salary at the rate of $4 *per diem*, it having been decreased to that amount unlawfully by the Secretary of the Treasury. Neither this Court nor the Court below considered or held that his failure to sue earlier deprived him of the right to recover.

2. Abandonment, acquiescence, laches and waiver are but features of the law of estoppel, and we submit that the facts here are such that there can be no estoppel against the appellant.

(a) The petition avers (R. 1, 2) and Finding XII (R. 11) states that appellant was holding his office from April 16, 1910, to November 12, 1920, various amended and supplementary petitions having been filed during the pendency of the case. The findings, opinion and judgment are dated February 21, 1921 (R. 6, 22).

This is the opening sentence of the opinion (R. 12):

> "The plaintiff was, during the period here involved, and still is, an inspector of customs at the Port of New York."

The government was not misled to its injury by the conduct of the appellant. His original petition was filed April 13, 1916, in which he claimed additional compensation at $1 *per diem* from April 16, 1910. An amended petition was filed July 2, 1919, in which the additional pay was claimed down to June 30, 1919, and an amended and supplemental petition was filed November 12, 1920 (Finding XII, R. 11), in which the additional pay was claimed from April 16, 1910, to and including October 10, 1919 (R. 5, par. XII). Appellant, in that petition, did not claim additional pay after October 10, 1919, because on the following day he was promoted to $5 *per diem* and August 25, 1920, he was promoted to $5.50 *per diem* (foot of Finding II, R. 7).

Thus it appears that appellant, by this litigation, was insisting on that additional pay, and that he was *promoted and given it one year and three months before the case was finally tried in the Court of Claims, January 11, 1921* (R. 6).

But aside from all this, we submit that if the case involved only the period from April 16, 1910, to the time he filed this action, April 3, 1916, the government was not misled to its injury by the appellant in taking pay at $4 *per diem*. The government lost nothing by that conduct on the part of appellant.

In *Ketchum vs. Duncan*, 96 U. S. 659, 666, this Court said:

> "An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up."

Legal rights are not lost by the silence or inaction of one party that *does not produce a change of position that results injuriously to the other party.* This is a well-settled rule of the law of estoppel.

> *Jones vs. United States,* 96 U. S. 24, 29;
> *Pickard vs. Sears,* 6 Ad. & El. 469, 474;
> *Hawes vs. Marchant,* 1 Curtis, C. C. 134, 144;
> *Dickerson vs. Duncan,* 100 U. S. 578, 580.

In the case at bar there was no change of position by the government as the result of the appellant's inaction or silence; on the contrary, the government's position remained unchanged before and during the litigation and it is still unchanged.

(b) We submit that the cases of *Glavey vs. United States, supra,* and *United States vs. Andrews,* 240 U. S. 90, are conclusive on the question of estoppel. Those were salary or compensation cases in which the government sought to apply the principle of estoppel against the officials who yielded to the actions of their superior officers on the subject of compensation and did not protest, but this Court held that each was entitled to his statutory compensation and was not estopped by his silence or inaction. In the *Andrews* case (p. 95) this Court said:

> "The basis of the ruling in the *Glavey* case was the right of the official to rely upon the provisions of the statute and the resulting want of power to apply the principle of estoppel."

That is exactly what this appellant has been and is doing in the case at bar.

(c) The Court below (R. 22) cites *United States vs. Garlinger,* 169 U. S. 316, 322, as in support of its views.

That case was fully considered in *Whiting, Admx. vs. United States,* 35 Ct. Cls. 291, 301, 302. Whiting was an employee in the Coast Survey on a salary of $2,400 a year until August 18, 1894, when the Secretary of the Treasury reduced it to $1,600 *per annum* (p. 299). The action was to recover the difference in salary upon the theory that the salary was fixed by statute, and that the Secretary had no power to reduce it below $2,400 *per annum* (p. 299). The government contended that the decedent accepted the reduced salary without objection and was thereby estopped to claim the difference mentioned (p. 299) on the authority of the *Garlinger* case (p. 301), but the Court of Claims, speaking through Judge Weldon, differentiated the two cases in reasoning that is clearly applicable to the case at bar (pp. 301, 302) because in the *Garlinger* case the plaintiff based his action on a *regulation* which he contended created a contract by implication, whereas the *Whiting* case was predicated on a *statutory right*, which is exactly the situation in the instant case.

The Whiting estate recovered judgment for the full amount sued for.

The decision in the *Whiting* case is in complete harmony with the decisions of this Court in the *Glavey* case and the *Andrews case, supra.* While the *Garlinger* case is not mentioned in those cases, yet they were decided on grounds that clearly differentiate them from that case, and as clearly include the present case in their doctrine.

We submit that the *Garlinger* case is not in point for any purpose whatever in the case at bar.

III.

The findings and opinion of the Court below.

The Findings.

An examination of the findings and opinion of the Court below will disclose a number of inconsistencies. It is deemed advisable to discuss the argument of the Court below and to point out, as we proceed, the inconsistencies in the findings and opinion.

Before proceeding with such discussion, however, it may be advisable to refer to the seeming importance attached by the Court below to the "class" designations by numbers of the inspectors when referring to their appointments.

(a) All through the findings, the terms "Class 1," "Class 2," and "Class 4" are used, and the Court below has apparently proceeded upon the theory that inspectors are divided into classes by statute. Such is not the fact. The use of "class" designations was begun by the Treasury Department more than a half century ago. These "class" designations merely indicate the amount of salary paid to the particular inspector, as the public records disclose.

Prior to the Act of March 4, 1909, inspectors in the small seaboard and interior ports received a com-

pensation of $3 *per diem* under Section 2733 of the Revised Statutes. These men were designated as "Class 1." In the larger seaboard ports, with the exception of New York, the inspectors received $4 *per diem,* pursuant to the Act of April 29, 1864 (c. 71, 13 Stats. 61), and the Act of July 23, 1866 (c. 208, Sec. 9, 14 Stats. 208). These inspectors were designated as "Class 2." The inspectors at the Port of New York received $5 *per diem,* pursuant to the Act of December 16, 1902 (c. 2, 32 Stats. 753), and the Act of June 30, 1906 (c. 3912, 34 Stats. 636), and were designated as "Class 4." These "class" designations are used by the Treasury Department and the Civil Service Commission merely for convenience and cannot and do not have any effect upon the right of these inspectors to claim their *statutory salaries.* As new grades of inspectors were created, following the reorganization in the Port of New York, July 1, 1910, some at $4.50 *per diem,* some at $5.50 *per diem,* and others at $6 *per diem,* it became necessary to use additional class designations. The $6 inspectors were designated as "Class 5" (R. 10, Finding VI). With this explanation, further reference to the class designations is deemed unnecessary.

(b) Under Finding III, R. 7, it appears that appellant Ryan received the sum of $2,428 during the period from April 16, 1910, to October 10, 1919, as additional compensation under the Act of February 13, 1911. This additional compensation was paid to Ryan by the steamship companies for overtime services required of him by the Collector of Customs. This sum of money was not paid to Ryan by the government

as there is no provision under the law for the payment of overtime to customs inspectors by the government. The Act of February 13, 1911 (Sec. 5, c. 46, 36 Stats. 899-1001), requires steamship companies to pay customs inspectors for all overtime services rendered at the request of the companies.

(c) In Finding V, R. 8, appears a statement (near the bottom of the page) that it is not shown how many of the inspectors received the additional dollar per day for service at unusual hours, or in what amount, from October 1 to December 31, 1905. In Finding VI, R. 9, it appears that all the inspectors at the port of New York received the additional dollar *per diem* during the aforesaid three months and without regard to whether or not they had rendered services at unusual hours. They received this dollar *per diem* compensation under the provisions of the Deficiency Acts mentioned in the said finding.

It appears from Finding VI, R. 9, that all the inspectors at the port of New York, prior to the plaintiff's appointment and after the passage of the Act of December 16, 1902, had received $5 *per diem*. It appears in Finding IV, R. 7, that prior to the passage of the Act of 1902 and on and after the Act of April 29, 1864, all of the inspectors in the Port of New York had received $4 *per diem*. The query naturally arises as to where can the authority be found for the appointment of appellant Ryan on April 16, 1910 at $4 *per diem*.

In Finding VI, R. 9, (last sentence at bottom of the page), the Collector of the Port, it appears, wrote to the Secretary of the Treasury, in recommending

the classification of July 1, 1910, heretofore mentioned, and said:

> "I believe that $5.00 *per diem* is too liberal a salary for a young man just entering the inspectors' corps without any particular knowledge of customs or experience in the duties of inspector * * * ."

It thus appears that the Collector undertook to set up his judgment against the judgment of Congress, and here is the real reason for the appointment of Ryan and other inspectors at a salary less than that provided by the statute. If it were desired to classify the inspectors into grades, the Collector had the power to grade them from a $5 minimum to a $6 maximum, according to their several abilities, and no one could have found fault with his classification. The difficulty arose out of the Collector's endeavoring to supersede the judgment of Congress with his own judgment. It may be well to note in passing that the findings show that appellant Ryan was first appointed to the customs service on April 13, 1899 (R. 7). Thus he had completed eleven years of service before his appointment as inspector.

(d) Finding IX, R. 11, states that the Treasury Department had always construed the various acts with reference to the salaries of inspectors of customs as authorizing a classification thereof. This finding is diametrically opposed to Finding IV, R. 7, wherein it appears that *all* inspectors at the port of New York received $4 *per diem* after the Act of April 29, 1864, and to Finding VI, R. 9, that *all* the inspectors at the port of New York had received $5 *per diem* after the Act of December 16, 1902. The learned Court below

was probably confused by the class designations heretofore referred to and which, as we have explained, merely indicate the amount of salary received by the inspectors so designated.

The Opinion.

Reference has been heretofore made in the statement of facts as to the reasons for the various petitions filed herein, and particularly as to the reason for reducing the appellant's claim from $2 *per diem* to $1 *per diem* following the decision of this Court in the Cochnower case. It is therefore unnecessary to refer further to the opening statement of the Court below in its opinion. That opinion was written by Downey, J., who, while Comptroller of the Treasury in 1914 as we have heretofore shown, had reviewed a disallowance of the auditor of the Treasury Department of a similar claim.

(e) On page 14 of the Record, in discussing the Cochnower case, the Court below takes the view that this Court regarded that case as one involving simply a reduction of salary. The Court below draws a distinction between the fact that Cochnower was appointed prior to the Act of March 4, 1909, while the appellant, in the case at bar, was appointed after that day; that Cochnower suffered a reduction in salary but that appellant was originally appointed at $4 *per diem*. The Court then goes on to say that these stated differences seem to be material ones. This argument overlooks the decision of this Court in the Cochnower case that there was no power in the Secretary of the Treasury to *reduce the salary of the office* held by Coch-

nower. Of course, this Court never intended to hold and did not hold that there was no power in the Secretary to *reduce* Cochnower. As we have heretofore pointed out, counsel for Cochnower conceded that there was no question of the right of the Secretary to reduce him to a clerkship, to a messengership, or to any other position deemed advisable. This argument also overlooks the fact that the Cochnower case was prosecuted upon the sole ground that Cochnower held an office, the salary of which had been fixed by law at $5 *per diem*, and that there was no power in the administrative branch of the Government to reduce the salary of this office without legislative permission. Ryan was appointed to the *same office* and should have received the compensation attached by law thereto.

(b) We are unable to follow the Court below in its reasoning on page 14 of the Record, for it seems that the Court argues directly against its own contentions. The concluding sentence of the Court's opinion on that page is:

> "While it was held in the Cochnower case that the Secretary of the Treasury had no right to reduce Cochnower's compensation from $5.00 to $4.00 per day, the holding was apparently upon the theory *that the statutory compensation of an inspector was $5.00 per day, which the Secretary had no right to reduce.*" (Italics ours.)

The forgoing sentence states precisely the contention of Cochnower's counsel that was sustained by this Court. If it be true, and this Court has said that it is true, that the statutory compensation of an inspector in New York was $5 per day, then it irresistibly fol-

lows that Ryan, who was indisputably lawfully appointed to the office of inspector, did not receive all the compensation belonging to him.

At the top of page 15 of the Record appears a statement by the Court below that it has no desire to take issue with this Court in its decision of the Cochnower case. In the last paragraph of that page the opinion, however, says:

> "It seems to us that the change in Cochnower's salary from $5.00 to $4.00 *per diem* is not, under the circumstances, to be *regarded as a decrease in a statutory salary*, but rather a demotion in a classified service." (Italics ours.)

It thus appears that the Court below does take issue with the decision of this Court in the Cochnower case. About the middle of page 15 appears this statement in the opinion:

> "The change in Cochnower's salary from $5.00 to $4.00 per day is treated as a reduction of a statutory salary and upon that basis may be conceded to have been unauthorized."

The inconsistencies in the foregoing quotations are manifest, and need no comment.

At the middle of page 15 appears a quotation from the decision of this Court in the Cochnower case with reference to the power of classification. Again, it is necessary for us to state that this Court squarely held that if there was such a power of classification given in the Act of 1909, such classification could be accommodated between the maximum amount named in the statute ($6.00) and the minumum amount ($5.00) which this Court held to be the statutory salary prior to the passage of that Act.

The Court below assumes (bottom of page, R. 15) that there was authority to classify at $4, $5 and $6 *per diem* despite the decision of this Court that $5 was the statutory salary and therefore the minumum, and the learned Court below goes on to argue that the appointing power must have had authority to demote from the $5 to the $4 class and that *such demotion was not a reduction in a statutory salary*. Again, the Court below takes issue with this Court and holds that there was no reduction in the statutory salary of the office held by Cochnower.

(h) On page 16 of the Record, the Court below seems to take the view that the Act of 1902 must have fixed by its terms, the salary of inspectors at $5 *per diem*, if the contention of the appellant in the case at bar is to prevail. The Act of 1902, as we have heretofore pointed out, may not have been sufficient in itself to increase the salary of the office of an inspector of customs at the port of New York without some affirmative act on the part of the Secretary of the Treasury, but the latter did act pursuant to the statute, and increased the pay of *all* the inspectors at that port to the maximum named therein, $5 *per diem* (Finding VI, R. 9). The salary then became fixed at $5 and Congress expressly ratified and confirmed this fixation by the Acts of 1906 and 1907, as we have seen.

On page 17 of the Record, middle of the page, appears the following statement in the opinion:

> "To sustain the theory that this might not be done and therefore to sustain the plaintiff's claim, it is necessary to revert to the preceding Act of 1902; conclude that that Act fixed

> the salary of inspectors at $5 per day; that all inspectors were entitled to receive that salary and that the Act of 1909 *conferred no power to reduce, by reclassification or otherwise, the salary thus fixed.*" (Italics ours.)

The part that we have italicized in the foregoing quotation raises again the precise question that this Court settled in the Cochnower case; namely that if there was power of classification it was to be exercised between the minimum of $5, the fixed salary, and $6, the maximum authorized under the Act of 1909.

(i) At the bottom of page 17 of the Record, the Court below continues to maintain its contention that there was no fixed salary of $5 *per diem* and cities the Act of March 3, 1881 (21 Stats., 429), which authorized the Secretary of the Treasury to appoint inspectors of customs at less than $3 per day when, in his judgment, the public service would permit. The Court below overlooks the fact that the later statutes of 1902, 1906 and 1907, applying only to the port of New York, render inapplicable the Act of 1881, which was manifestly passed to permit the Secretary to appoint inspectors in certain small ports at less than the amount fixed in Section 2733 of the Revised Statutes. Whatever may be the Secretary's powers with regard to the salaries of customs inspectors in other ports, the Acts of 1902, 1906 and 1907 fixed the salary of the New York inspectors at $5 and the Act of 1909, general in its scope, permitted the Secretary to increase this amount as he saw advisable, not to exceed $6. Futhermore, this Court had before it and considered the Act of 1881 in the Cochnower case (Cochnower, R. 9).

(j) Near the middle of page 18 of the Record appears the following from the opinion:

> " * * * The Secretary, under the authority of that Act (referring to the Act of 1902), did appoint many, *and for ought we know* all of the inspectors then 'Class 2 at $4.00 *per diem*, inspectors Class 4, $5.00 *per diem*." (Italics ours.)

Finding VI, R. 9, recites that *all* inspectors at New York received $5 *per diem* under the Act of 1902.

(k) In discussing the Deficiency Acts of 1906 and 1907, the Court below (R. 19, middle of the page) says:

> "Just what the situation to be met by the Deficiency appropriation was, is not clearly shown, and we are not informed whether payment was to be made to all inspectors or in the same amounts or upon a basis of equalization."

Finding VI, R. 9, states that the compensation of New York inspectors for the three months of October, November and December, 1905, were adjusted by the Deficiency Acts of 1906 and 1907. The Court had before it the department reports on this point and found the facts accordingly. It thus appears that the Court had evidence before it showing that each of these New York inspectors received $1 *per diem* for the three months that he suffered the demotion, and it so found.

(l) On page 21 of the Record, the Court below, in its opinion, points out that under the Civil Service law a classified employee in Class 2 was entitled to receive a salary of $1,400 per year minimum and not

more than $1,600, and the argument is advanced that because Ryan was classified as inspector, Class 2, he could not receive a salary in excess of $1,600 upon his appointment as inspector. The Court *confuses the classification* of the clerical employees in the Departments as provided in Revised Statutes, Sections 163 and 167, and the classification of inspectors growing out of Department practice alone. The foregoing sections of the Revised Statutes provide for the salaries of clerks and other employees in the Departments alone, and fix $1,800 as the salary for Class 4, $1,600 for Class 3, $1,400 for Class 2, and $1,200 for Class 1. No other classes are provided for. It will be remembered that $6 inspectors are known as *Class 5*. They receive $2,190 per annum. Inspectors of customs are not numbered by the same system of classification, as heretofore explained. In fact, the inspectors of customs are not clerks or employees of the Departments so as to come within the foregoing provisions of the Revised Statutes. They are officers in the customs service.

Stewart vs. United States, 17 Howard 116, 127, 128;
United States vs. McEwan, 44 Fed., 594;
Act of July 31, 1789, c. 5, Sec. 29, 1 Stats., 45.

Congress, and the courts as well, have always made clear distinctions between clerks and employees on the one hand, and officers of the United States on the other; *inspectors belong in the latter category*. That is settled law. The only similarity between clerks under the Civil Service rules and inspectors under department practice is that both are required to pass

a first grade examination before being eligible for appointment. It would thus seem that the learned Court below fell into the error of assuming that an inspector, Class 2, was under the same salary limitation as a clerk, Class 2, under R. S. 167 and the Civil Service regulations.

IV.

The effect of the executive order of March 3, 1913.

The Court below finds (Finding VII, R. 10) that the reorganization of the customs service in New York that became effective July 1, 1910, was continued after the reorganization of the customs service by the President under authority of the Act of August 24, 1912, effective July 1, 1913 (c. 355, 37 Stats. 434). The following finding, however (R. 11), shows clearly that the Treasury Department has always construed and treated the estimate annexed to the Executive order as an estimate only, and therefore subject to variance each succeeding year. As the "estimate" that was annexed to the Executive order (U. S. Comp. Stats. 1913, 5327), set forth the various numbers of inspectors of each class, and their respective salaries, it cannot be argued that these classes or salaries were intended to be made permanent by the Executive order. The Treasury Department has *never so regarded it*, as Finding VIII shows. Only the executive order proper became permanent law, and in no part of the order can be found any reference to the salaries of

inspectors. The estimates annexed to the order have been varied from year to year. The estimate annexed to the order provided for some 90 inspectors at $6 *per diem,* 216 at $5, and 113 at $4 *per diem* in the port of New York. Succeeding estimates submitted by the Secretary changed both the total number of inspectors and the number of each grade. At the present time, there are not more than 15 or 20 $4 inspectors, all the others having been promoted to $5, $5.50 or $6.00. It thus appears that the Executive order has no effect whatever upon the rights of the appellant.

We submit that the judgment of the Court below should be reversed and that the appellant should have judgment for $1.00 *per diem* from April 16, 1910 to and including October 10, 1919, 3465 days, amounting to $3,465.00, as prayed for in his petition.

Respectfully submitted,

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